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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

vs.

RUSSELL RICHARD DODSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a county-employed public defender acts under color of state law in representing indigent defendants so as to be subject to suit under 42 U.S.C. §1983.

2. Whether a county-employed public defender appointed to represent indigent defendants enjoys an absolute immunity, rather than a qualified immunity, from suits brought under 42 U.S.C. §1983 for actions taken while representing such indigent clients.

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IN THE

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POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

vs.

RUSSELL RICHARD DODSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The Order of the United States District Court for the Southern District of Iowa, Central Division, of November 5, 1979 (Civil No. 79-507-B) dismissing Mr. Dodson's action is reported at 483 F.Supp. 347, and is found in Appendix "B" to the Petition for Writ of Certiorari.

The opinion of the United States Court of Appeals for the Eighth Circuit affirming in part and reversing in part the

District Court's judgment was filed on August 26, 1980, is reported at 628 F.2d 1104, and is found in Appendix "A" to the Petition for Writ of Certiorari.

JURISDICTION

This action was filed in the United States District Court for the Southern District of Iowa, Central Division, on November 5, 1979, asserting claims under 42 U.S.C. §1983 and implicitly invoking federal jurisdiction under 28 U.S.C. §1343. (Joint App., pp. 4-23). The District Court dismissed the action the same day, and Mr. Dodson filed a timely Notice of Appeal with the Eighth Circuit Court of Appeals on November 23, 1979. (Joint App., p. 47). The Court of Appeals entered its judgment affirming in part and reversing in part the District Court's opinion on August 26, 1980. (Petition for Cert., App. A). Polk County and its agents filed their Petition with this Court for a Writ of Certiorari on November 21, 1980, alleging grounds specified in Supreme Court Rule 17.1, including a conflict among decisions of various circuits of the Courts of Appeals. This Court granted certiorari on March 2, 1981 (Joint App., p. 49), exercising its jurisdiction under 28 U.S.C. §1343(3).

STATUTE INVOLVED

The statute in question is 42 United States Code Section 1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the juris-

diction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF CASE

Respondent Russell Richard Dodson filed a Pro Se Complaint in the Southern District of Iowa on November 5, 1979. The Complaint alleged that Martha Shepard, an Assistant Public Defender, had been appointed to represent him on an appeal to the Iowa Supreme Court on a state conviction for robbery. It was alleged that Shepard ultimately moved to withdraw as counsel and to have the appeal dismissed as frivolous pursuant to Iowa Rule of Appellate Procedure 104. Respondent alleged that Shepard's actions deprived him of his right to counsel, inflicted upon him cruel and unusual punishment, and arbitrarily denied him his statutory right to an appeal, all in violation of the due process clause of the Fourteenth Amendment. Respondent sought monetary damages and injunctive relief and set out pendent claims for malpractice and breach of contract to handle the appeal.

The Polk County Offender Advocate, the Polk County Board of Supervisors and Polk County were also named as defendants by Dodson. They were alleged to be responsible for Ms. Shepard's actions because they established rules and procedures for her to follow in handling criminal appeals. The jurisdiction of the federal court was specifically invoked under 42 U.S.C. § 1983, and the deprivations were alleged to have been under color of state law. (The Complaint is set out in the Joint Appendix at pp. 1-23).

On November 5, 1979, the Complaint was dismissed by Order of the Honorable Harold D. Vietor. The district court found that the public defender did not act under color of law for purposes of jurisdiction under 42 U.S.C. § 1983. Judge Vietor also found that the Complaint failed to allege sufficient personal involvement of the Polk County Supervisors and Polk County. The pendent state claims were dismissed as well. (The decision of the District Court is set out in the Petition for Certiorari as Appendix B).

A timely Notice of Appeal was filed, and present counsel was appointed by the Eighth Circuit Court of Appeals. The Eighth Circuit reversed the decision of the district court and found that the public defender does act under color of law and is entitled to a qualified immunity. The Honorable William R. Overton, United States District Judge for the Eastern District of Arkansas, sitting by designation, dissented. The opinion of the Circuit Court of Appeals is set out in the Petition for Certiorari as Appendix A.

A timely Petition for Writ of Certiorari was filed by Petitioner. Certiorari was granted on March 2, 1981, to review two issues: (1) Does the public defender act under color of law in representing indigent defendants for purposes of 42 U.S.C. § 1983?; and (2) Is the public defender entitled to a qualified immunity from suit under 42 U.S.C. § 1983? Permission to proceed *in forma pauperis* was granted Respondent on March 2, 1981, and present counsel for Respondent was appointed by this Court on March 23, 1981.

SUMMARY OF ARGUMENT

I.

In *Gideon v. Wainright,* 372 U.S. 335 (1963), the Court held that it is the constitutional duty of the State to provide

counsel for indigent criminal defendants. States have traditionally met this obligation in two ways: (1) the appointment of counsel from the private bar, or (2) the establishment of public defender offices by counties or other governmental subdivisions. The involvement of the state and its political subdivisions in the implementation, funding, and supervision of the public defender system means that the public defender and his assistants necessarily act with the power of the state and that the public defender and his assistants act under color of law for purposes of 42 U.S.C. §1983.

The role of the state and its subdivisions in the Iowa public defender system is pervasive. Pursuant to the Iowa Public Defender Act (Chapter 336A, Code of Iowa, 1981), the involvement of the County Supervisors in the office of the public defender includes: the initial decision to create the office, the selection of the public defender and his assistants, approval of salaries and budget of the office and its employees, the definition of "indigency," and review of the program on an annual basis. The public defender is instructed to defend each indigent requesting counsel or on motion or order of the court. The indigent criminal defendant has no choice in the selection of his counsel. The role of the government dominates every aspect of the public defender office in Iowa.

Whether the public defender exercises independent judgment and owes his allegiance to his client is not dispositive of action under color of law for Section 1983. Many public officials or employees exercise judgment independent of their public status and have been found amendable to suit under Section 1983. Thus, this Court has found that prison administrators, mental hospital directors, school administrators, and police officers act under color of law. Similarly, the fact that the public defender owes his allegiance to his client is not controlling on the color of law

issue. This Court in *O'Connor v. Donaldson,* 422 U.S. 563 (1975) implicitly found that a doctor-patient relationship did not negate action under color of law. The instant attorney-client relationship is indistinguishable. Moreover, there are instances when a criminal defense attorney owes a duty to the judicial process that is in conflict with the interests of his client.

The mutual interdependence of the State of Iowa and the public defender require a finding that the public defender acts under color of law. This is essentially a fact finding inquiry. This Court in *Branti v. Finkel,* 445 U.S. 507 (1980) has found on different factors from the instant case that the public defender does act under color of law. The activities of the state in implementing, funding, and supervising the public defender's office "fosters and encourages" the office, and a "symbiotic relationship" is created. The state fulfills its constitutional obligations of providing counsel for indigent defendants through the public defender, and the action of the public defender becomes "state action" under § 1983.

The decision of the Court of Appeals that the public defender and his assistants act under color of law for purposes of 42 U.S.C. § 1983 should be affirmed.

II.

In *Ferri v. Ackerman,* 444 U.S. 193 (1979), this Court held that attorneys appointed pursuant to the Criminal Justice Act were not entitled as a matter of federal law to absolute immunity for state malpractice claims. This decision is dispositive of the immunity issue in the instant case, for if full immunity is not required for lawyers under the Criminal Justice Act, then it is not required under § 1983.

The decision below, imposing a qualified immunity for public defenders, is an appropriate compromise between the interests of the public, the public defender, and the indigent client.

While *Imbler v. Pachtman,* 424 U.S. 409 (1976) requires an analysis of the common law immunity and contemporary public policy considerations to decide an immunity issue, there is no controlling common law or legislative history regarding public defenders. At common law, it was well established that a client could sue his attorney for breach of contract and negligence. The same rule should be recognized under § 1983.

In reaching its decision in *Ferri v. Ackerman,* 444 U.S. 193 (1979) this Court distinguished the role of the judge, prosecutor, and defense counsel. "The primary rationale for granting immunity to judges, prosecutors, and other public officials does not apply to defense counsel sued for malpractice by his own client." Id. at 204. This Court's prior decisions granting a qualified immunity to various public officials exercising discretionary functions mandates that the same limited defense should be made available to public defenders.

There are no compelling public policy considerations warranting public defenders an absolute liability from suit. There is presently a glut of lawyers available to serve as public defenders and the goal of "unfettered" decision making by public defenders will be preserved by a qualified immunity. The attention of the public defender from his statutory responsibility of representing criminal defendants will not be unnecessarily diverted with a qualified immunity from liability, and the time investment of the federal judiciary will not be significant. The Federal Rules of Civil Procedure provide adequate mechanisms such as motions to dismiss and for summary judgment to deal efficiently with

the frivolous suit. The imposition of an absolute immunity will deprive the meritorious claim of redress and is not justified in this context.

The decision below carefully defined the necessary qualified immunity and this limited defense is justified on public policy grounds. Two major purposes of Section 1983 are to provide compensation for injuries and a federal forum for redress of injuries. State remedies such as habeas corpus, post-conviction relief, and tort claims procedures are inadequate in practice and effect. A federal forum is necessary for the "preservation of human liberty and human rights."

The decision of the Court below should be affirmed in all respects. The public defender acts under color of law and is entitled to a qualified immunity under 42 U.S.C. §1983.

ARGUMENT

I.

THE PERVASIVE INVOLVEMENT OF THE GOVERNMENT IN THE PUBLIC DEFENDER OFFICE MEANS THAT THE PUBLIC DEFENDER ACTS WITH THE POWER OF THE STATE AND UNDER COLOR OF LAW FOR PURPOSES OF 42 U.S.C. SECTION 1983.

In *Gideon v. Wainright,* 372 U.S. 335 (1963), the Court held it is the constitutional duty of the state to provide counsel for indigent criminal defendants. As the Court had explained in holding this same right applicable to federal prosecutions in *Johnson v. Zerbst,* 304 U.S. 458 (1938), the provision of defense counsel for indigents is a governmental

responsibility since the Constitution withholds from the government "the power and authority to deprive an accused of his life and liberty unless he has or waives the assistance of counsel". Id. at 463. As this Court has long recognized, "the right to counsel is the right to the effective assistance of counsel". *McMann v. Richardson,* 397 U.S. 759, 771 (1970).

States have met their burden of providing competent defense counsel to indigent criminal defendants in two ways. The first is the appointment of private counsel from the practicing bar.[1] The second method is the establishment of public defender offices by counties or combinations of counties.[2] The involvement of the state and its political subdivisions in the creation, implementation, funding, and supervision of the public defender system means that the public defender necessarily acts with the power of the state and that both the public defender and his or her assistants act under color of law.

A. THE INVOLVEMENT OF THE STATE UNDER THE IOWA PUBLIC DEFENDER ACT IS PERVASIVE.

The public defender office in Iowa is a statutory creation. Chapter 336A of the 1981 Code of Iowa is set out for the Court as Appendix A to Petitioner's brief.[3] The "Iowa Public Defender Act" authorizes county supervisors to establish or abolish the office of public defender. The

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[1]See, e.g. Section 815.7, Code of Iowa (1981).

[2]See e.g. Chapter 336A, Code of Iowa.

[3]The district court and the Court of Appeals took judicial notice of the Polk County, Iowa, ordinances which authorize the Polk County Offender Advocate's office. These ordinances merely implement the grant of authority conferred by Chapter 334A, Code of Iowa (1981). Petitioners do not essentially dispute this description of the Polk County Offender Advocate. See pages 3-5 Petitioner's brief.

supervisors may appropriate funds from the court fund and may accept money and other contributions from individuals and other public agencies for this office (Section 336A.2). The public defender is nominated by the district court judges of the county, and if appointed by the supervisors, serves for a six-year term (Section 336A.2).[4] The compensation of the public defender and his or her assistants is fixed by the board of supervisors (Section 336A.5). While the public defender may appoint "assistant attorneys, clerks, investigators, stenographers, and other employees", their compensation is also fixed by the supervisors (Section 336A.5). Similarly, the county supervisors provide office space, furniture, equipment and supplies for the public defender (Section 336A.9).

The duties of the public defender and his assisants are also carefully outlined in Chapter 336A. The public defender shall represent each "indigent" requesting counsel or on motion or order of the Court (Section 336A.2). "The determination of indigency shall be made by the public defender within criteria set out by the board of supervisors (Section 336A.4)." The public defender shall counsel and defend each person he represents at every stage of the proceedings against him and "prosecute any appeals or other remedies before or after conviction that he considers to be in the interest of justice (Section 336A.6)." The supervisors may require the public defender and his assistants to refrain

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[4]Respondent will use the term "public defender" rather than "offender advocate" so as to maintain uniformity with Petitioner's brief.

from private practice (Section 336A.10) and the public defender may not recommend private lawyers (Section 336A.11). Finally, the public defender is required to make an annual report to the judges of the district court, the attorney general and the board of supervisors, "reporting all cases handled by him during the preceding year (Section 336A.7)."

This review of Chapter 336A evidences that local government dominates the office of the public defender. The role of the county supervisors includes: the initial decision to create the office, the selection of the public defender and his assistants, approval of salaries and budget of the office and its employees, the definition of "indigency", and review of the program on an annual basis. They may terminate the office by resolution of the board pursuant to Section 336A.1. The Court of Appeals below was surely correct when it held that an attorney in a county funded public defender's office acts under color of state law in representing indigent Defendants. The Court of Appeals was persuaded by the extent of the state involvement and succinctly stated its holding that the public defenders act under color of state law as stated at 628 F.2d 1106:

> All these lawyers are selected, paid, hired, and fired by the County. Whether individual decisions made by the attorneys in the office of the Offender Advocate are governed or influenced by the County or its officials is therefore beside the point. Public defenders receive their power not because they are selected by their clients, but because they are employed by the County to represent a certain class of clients, who likely have little or no choice in selecting the lawyer who will defend them. In short, we are persuaded by the analysis, on this point, of *Robinson v. Bergstrom*, 579 F.2d 401, 404-08 (7th Cir. 1978) (per curiam).

In *Robinson v. Bergstrom, supra,* the Seventh Circuit found on identical facts to the instant case that the public defender acted under color of state law. The public defender in Illinois who was selected, compensated and appointed by the county to represent indigent criminal Defendants was found to be an "instrumentality" of the state and amenable to suit under 42 U.S.C. §1983, 579 F.2d 405.

B. WHETHER THE PUBLIC DEFENDER EXERCISES INDEPENDENT JUDGMENT AND OWES HIS ALLEGIANCE TO HIS CLIENT IS NOT DISPOSITIVE OF ACTION UNDER COLOR OF LAW FOR §1983.

Petitioners make two main arguments as to why the public defender does not act under color of state law.[5] The first argument is that the public defender exercises judgment independent of the state in representing his client. This obligation is, of course, imposed upon all attorneys. The *Standards Relating to Defense Services,* approved by the American Bar Association in 1968 provided in §1.4 that defense counsel "should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice".[6] Petitioner's argument is not persuasive. This Court has routinely found that many individuals who exercise judgment independent of their status as a state official or instrumentality act under color of state law. Thus, prison administrators,[7] mental hospital directors,[8] school

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[5]Petitioners essentially concede the extensive state involvement in the public defender program (See Petitioner's Brief pp. 3-5).

[6]American Bar Association Project of Standards for Criminal Justice, *Standards Relating to Defense Services,* (1968), §1.4 at p. 6.

[7]*Procunier v. Navarette,* 434 U.S. 555 (1978).

[8]*O'Conner v. Donaldson,* 422 U.S. 563 (1975).

administrators,[9] and police officers[10] all act under color of state law. The simple fact that the public defender has some independence and can act with the same discretion enjoyed by any other attorney is simply not dispositive of the color of law issue.[11]

Petitioner's second argument is that once appointed, the public defender owes his sole loyalty to the client. (Petitioner's Brief pp. 30-41). This argument is largely irrelevant to the question at hand. In *O'Connor v. Donaldson,* 422 U.S. 563 (1975) a former mental patient brought suit under 42 U.S.C. §1983 against the state hospital superintendent and other members of his staff alleging an

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[9]*Wood v. Strickland,* 420 U.S. 308 (1975).

[10]*Pierson v. Ray,* 386 U.S. 547 (1967).

[11]Petitioner does not argue that the analysis of *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974) is here appropriate. Indeed, *Jackson* is not cited as authority in Petitioner's brief. Respondent submits that the holding of *Jackson,* that there must be a "sufficiently close nexus between the state and the challenged action" is inappropriate in the instant factual context. When, as here, the public defender is an "instrumentality" of state government, the *Jackson* "nexus test" should not be applied. Several Circuit Court decisions agree: *Hollenbaugh v. Carnegie Free Library,* 545 F.2d 382 (3rd Cir. 1976) holding the state's extensive participation in the library program to make a *Jackson* analysis inapplicable; *Braden v. Univ. of Pittsburgh,* 552 F.2d 948 (3rd Cir. 1977) (en banc) holding the analysis of *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1962) to be applicable to a determination of state action; and *Chalfant v. Wilmington Institute,* 574 F.2d 739 (3rd Cir. 1978) (en banc) holding the status of the actor to be irrelevant if the institution upon whose behalf he acted is found to be an instrumentatlity of state or local government. Petitioner also relies on *Robinson v. Bergstrom,* 579 F.2d 401 (7th Cir. 1978) discussed at length in this brief. Respondent further submits that the analysis of *Burton v. Wilmington Parking Authority, supra,* is the proper one in this context.

intentional and malicious deprivation of his constitutional right to liberty. This Court did not even find it necessary to address the issue of whether the Defendant acted under color of law. Clearly, it was the status of Dr. O'Connor as director of the state hospital which triggered the state action necessary for the § 1983 action. Yet Dr. O'Connor owed his sole allegiance to his patient, Mr. Donaldson, and acted with discretion in treating his patient. The existence of the doctor-patient relationship did not negate the fact that the actions of the Defendant doctor were under color of law. Respondent submits that the doctor-patient relationship in *O'Connor v. Donaldson* is indistinguishable from the attorney-client relationship in the instant case. Quite simply, the existence of a professional relationship does not determine whether state action or action under color of law is present.

Petitioner's argument that the public defender's allegiance is solely to his client also evidences a simplistic and incorrect view of the criminal justice system. While a primary allegiance is to the client, there are many instances where the criminal defense attorney is ethically required to act in direct conflict with the interests of his client. The most obvious example is that when the defense attorney knows that his client is about to lie under oath, he must withdraw from the case. He may not participate in deceiving the Court.[12] The criminal defense attorney may reveal his client's intention to commit a crime, and must do so if the contemplated crime would seriously endanger the life or safety of any person or

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[12]ABA Standards for Criminal Justice: The Defense Function § 7.7 (1971).

currupt the processes of the Courts.[13] Winning isn't everything for the criminal defense lawyer. As stated by Chief Justice Burger:[14]

> I recall very well attending one of the meetings of the National Defender Project in which I have also been engaged for about the same period, when an enthusiastic young public defender got up and in the course of his discussion said, "The name of the game is to win." That's all very well if you're talking about the University of Minnesota football team because that's what the football team and fans think. If you are a candidate for governor or senator or president, that's true. The name of the game is to win. But the administration of criminal justice is a far more serious business, and the name of the game is not to win whether you are the prosecutor of the defense counsel.

The public defender owes to his client the responsibilities of an advocate. He owes to the criminal justice system the duty of preserving its integrity. His loyalty is mixed and sometimes in conflict. These dual responsibilities do not dispose of the color of state law issue in a public defender's representation of his indigent client.

Thus, Petitioner's focus on the professional relationship between the public defender and the indigent client is misplaced. Clearly, that relationship should strive to be the same as that between the privately retained attorney and his client. But there is a distinction, as noted by Chief Justice Burger:[15]

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[13]Id. Section 3.7

[14]Burger, "Counsel for the Prosecution and Defense — Their Roles under the Minimum Standards," 8 American Law Quarterly 1 (1969).

[15]Burger, Id. 6.

> I have already said that the defense counsel who is appointed by the court or is part of a legal aid organization, has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer. Having said that *we were compelled to recognize a reality. And that is that a defender establishment in a large city dealing with thousands of cases in a year, realistically is not quite in the same posture because the defendant does not pick his defense counsel.* His defense counsel is handed to him by the system, by society as it were. And so without ever at any point yielding on standards of ethical conduct, we recognize that there is a difference in some of the practical problems which confront a public defender. Time does not permit going into it, but it's important enough to mention, that we recognize the difference. The public defender has a more difficult task in securing and holding the confidence of his client. (Emphasis added)

The "reality" is precisely that recognized by the decision below and *Robinson v. Bergstrom* — the public defender is an employee and instrumentality of the state. For the indigent defendant the stakes are high. He has no voice in the selection of the attorney who will represent his interest.[16] The client is provided with the public defender by the State — the same party prosecuting him for a crime. The client is certainly justified in viewing the public defender's power as state power.[17]

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[16]See *Robinson v. Jordan,* 494 F.2d 793, 795 (5th Cir. 1974) (County health officer acted under color of state law where prisoner had no choice of doctor.)

[17]See, Note, "Liability of Public Defenders under § 1983, 92 Harvard Law Review 943, 947 (1979); and *Robinson v. Bergstrom,* 579 F.2d 401 (7th Cir. 1978).

C. THE MUTUAL INTERDEPENDENCE OF THE STATE OF IOWA AND THE PUBLIC DEFENDER REQUIRE A FINDING THAT THE PUBLIC DEFENDER AND HIS ASSISTANT ACT UNDER "COLOR OF LAW".

It is, of course, an essential jurisdictional ingredient that the Defendant act under "color of statute, ordinance, regulation, custom, or usage" to state an action under 42 U.S.C. §1983. Respondent in his complaint alleges that Martha Shepard, an attorney in the public defender's office, deprived him of his right to counsel, inflicted upon him cruel and unusual punishment and arbitrarily denied him his statutory right to appeal. The Polk County Offer Advocate (public defender) and the Polk County Board of Srvisors, were alleged to be responsible for Shepard's actions because they established rules and procedures for her to follow in handling criminal appeals.[18] Polk County was named as a Defendant, but was dismissed by the trial court and the Court of Appeals. The sole issue upon which Certiorari was sought and granted was the liability of the public defender.[19] A related question is the liability of the assistant public defender, Martha Shepard. In determining the color of law issue, we are embarking on a fact facting endeavor: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance." *Burton v. Wilmington Park Authority,* 365 U.S. 715, 722 (1962).

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[18]These allegations must be gleaned from Respondent's Complaint. They should be liberally construed and assumed to be true at this pleading stage of the litigation. *Scheur v. Rhodes,* 416 U.S. 232 (1974).

[19]See Petition for Writ of Certiorari filed November 21, 1980.

The traditional definition of "color of law" is from *U.S. v. Classic,* 313 U.S. 299, 326 (1942): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of state law". As observed by this Court in *U.S. v. Price,* 383 U.S. 787 (1966), in cases under 42 U.S.C. § 1983, "the phrase 'under color of law' has consistently been treated as the 'state action' required under the Fourteenth Amendment." Respondent submits than an analysis of decisions by this Court and a review of the Iowa Public Defender Act program mandates a finding that the public defender and his assistant in the instant case acted under color of law.

In *Branti v. Finkel,* 445 U.S. 507 (1980) this Court considered the plight of two assistant public defenders who were summarily dismissed from their positions because of their political affiliation. This case held that the assistant public defenders as public employees enjoyed the protection of the First and Fourteenth Amendments of the U. S. Constitution. Jurisdiction was based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). In *Branti,* then, the Court found that the action of the public defender in dismissing his two assistants was state action of sufficient breadth so as to satisfy the jurisdictional requirements of § 1983. The public defender in *Branti* acted under color of state law. The same result must follow in the public defender's representation of an indigent client.

The decisions of this Court clearly establish the doctrine that seemingly private conduct becomes state action if the private action is inextricably related to the state. Thus, in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1962) a private enterprise, the Eagle Coffee Shop, leased

property from the Wilmington (Delaware) Parking Authority. The building in which the coffee shop was located had been built with public funds for public purposes. The tenants refused to serve Negroes. While holding the actions of the tenant became state action, the Court stated at 365 U.S. 725:

> By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Similarly, in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972), this Court stated that activity by the state which "fosters or encourages" discrimination or creates a "symbiotic relationship" between private action and the state creates state action.[20] Also relevant is *Norwood v. Harrison,* 413 U.S. 455 (1973) holding that a state loan of textbooks to a private school with racially discriminatory admission policies warrants a finding of state action: "When, as here, that necessary expense is borne by the state, the economic consequence is to give aid to the enterprise; if the school engaged in discriminatory practices then the state . . . gives support to such discrimination." Id. at 464.

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[20]In *Moose Lodge,* the Court again engaged in a factual analysis of the relationship between the state and seemingly private action to determine the existence of State action or as the case held, that the issuance of a liquor license does not create state action.

This Court's most recent construction of the "under color of law" requirement of § 1983 is *Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979). Here, the Respondents were members of a regional planning agency for the development of Lake Tahoe, Nevada. Petitioners brought suit against the individual members of the planning agency and the agency itself under § 1983 alleging that Respondents' actions had destroyed the value of their property. The Respondents argued that they did not act under color of state law because formation of the Tahoe Regional Planning Agency (TRPA) required Congressional approval of an interstate Compact. While holding that an action under § 1983 could be maintained, the Court stated at 440 U.S. 399:

> The Compact had its genesis in the action of the compacting States, and it remains part of the statutory law of both States. The actual implementation of TRPA, after federal approval was obtained, depended upon the appointment of governing members and executives by the two States and their subdivisions and upon mandatory financing secured, by the terms of the Compact, from the Counties. In discharging their duties as officials of TRPA, the state and county appointees necessarily have also served the interests of the political units that appointed them.

It is in the context of state involvement in the public defender program that the instant action must be weighed. Under Chapter 336A, the public defender is both nominated and appointed by the state. The county supervisors through the funding process determine the number of attorneys for the office, their compensation, the budget, the clerical staff, and require reports as to the activities of the office. The county supervisors under Section 336A.4 even retain the right to set criteria for indigency and thereby to determine

who is eligible for public defender represation. This political who is eligible for public defender representation. This political control over the persons the public defender is to represent and over the number of attorneys and support personnel in the public defender's office will surely affect the caseload of the office and thus dictate the amount of time to devote to each case. As a consequence, the state effectively influences decisions made by public defenders in a way it cannot influence those made by private attorneys.[21]

Unlike the situation in *Moose Lodge, supra,* the State's involvement in the public defender office does not end with the issuance of a license to practice law. The state's participation in the public defender office is pervasive. The relationship between the state and the public defender is "symbiotic", *Moose Lodge, supra.* The state fulfills its constitutional obligation of providing counsel to indigent criminal defendants by "fostering and encouraging" public defender offices. In discharging their duties and the state's responsibility, the county appointed and financed public defender has "also served the interests of the political unit that appointed them." *Lake Country Estates v. Tahoe Regional Planning Agency, supra.* The public defender becomes an instrumentality of the government which he serves and as such acts under color of law.

In summary, an analysis of Chapter 334A in light of contemporary standards of state action requires a holding that the public defender and his assistants act under color of law in their representation of indigent criminal defendants. The constitutional obligation of the state includes the provision of

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[21]See, Note "Liability of Public Defenders under § 1983 92 Harvard Law Review 943, 947 (1979).

effective counsel to vigorously pursue an appeal, *Anders v. California,* 386 U.S. 738 (1967). When as in the instant case, there has been an alleged deprivation of that right, the public defender and his assistants must be held liable for damages under §1983.

II.

AN ABSOLUTE IMMUNITY FROM SUIT UNDER §1983 IS NOT JUSTIFIED FOR THE PUBLIC DEFENDER AND THE PUBLIC INTEREST AND THAT OF THE PUBLIC DEFENDER AND HIS CLIENT ARE BEST SERVED BY A QUALIFIED IMMUNITY.

Section 1983 states that "every person . . ." shall be liable to the party injured. The statute on its face admits of no immunities. Nevertheless, this Court and the lower federal courts have recognized various immunities necessary for the proper application of Section 1983. *Imbler v. Pachtman,* 424 U.S. 409 (1976), while holding that a state prosecuting attorney is absolutely immune from suit under §1983 proscribed a two-step analysis for the immunity issue: (1) a determination of the existence of a common law history of immunity and (2) an examination of "whether the same considerations of public policy that underlie the common law rule likewise countenance absolute immunity under §1983."

Since there were no public defenders prior to the enactment of §1983, the *Imbler* analysis is easily satisfied. The existing common law at the time of the enactment of Section 1983 held all attorneys responsible for their acts of

negligence, and a rule of no immunity might therefore seem required. The Court below, however, found that a qualified immunity was appropriate and Respondent is satisfied with that decision.

In *Ferri v. Ackerman,* 444 U.S. 193 (1979) the Court held that attorneys appointed pursuant to the Criminal Justice Act were not entitled to absolute immunity from malpractice claims as a matter of federal law. The Court below found the reasoning of *Ferri* to be applicable to the instant case based upon §1983 and granted to the public defender a qualified immunity from suit (628 F.2d 1107). Respondent submits that *Ferri* is dispositive of the issue and that the decision below is correct.

A. THERE IS NO RELEVANT LEGISLATIVE HISTORY TO SECTION 1983, BUT THE COMMON LAW AT THE TIME OF THE STATUTE'S ENACTMENT RECOGNIZED THE LIABILITY OF ATTORNEYS TO THEIR CLIENTS.

The legislative history of Section 1983 is obviously of no value to this inquiry since public defenders were unknown at the time of the statute's enactment. There is no controlling common law precedent for the same reason. If then, the analysis of *Imbler v. Pachtman,* 424 U.S. 409 (1976), *supra,* is dispositive, the question must be resolved that the public defender enjoys no immunity.

This Court has suggested that the paucity of common law history may be remedied by analogizing the functions of the "new office" to those of an office existing at common law. See *Wood v. Strickland,* 420 U.S. 308, 318-319 (1975); *Butz v. Economu,* 438 U.S. 478 (1978). Respondent suggests that the office of the public defender is without

common law precedent and he can find no better analogy than a private attorney. The common law is replete with instances of clients' actions of malpractice, negligence and breach of contract. See, e.g. *Pitt v. Yaldin,* 4 Burr. 2060, 98 Eng.Rep. 74 (K.B. 1767) (for representation in civil matter) *Stephens v. White,* 2 Va. 203 (1796) (civil); *Eccles v. Stephenson,* 6 Ky. 517 (1814) (civil); *Hatch v. Lewis,* 175 Eng.Rep. 1145 (N.P. 1861) (criminal); *Malone v. Sherman,* 49 N.Y.Super. 530 (1883) (criminal). Also see *Spring v. Costantino,* 362 A.2d 871, 879 (Conn. 1975) holding unanimously that a state public defender enjoys no common law immunity from state malpractice action.

Petitioners focus on the common law of defamation (Petitioner's brief pp. 44-52) is irrelevant. Dodson did not allege defamation in his complaint, and the issue is simply not before the Court in this case. Moreover, the same arguments were made in *Ferri v. Ackerman,* 444 U.S. 193 (1979) and were disposed of as being unpersuasive for the broad immunity there requested. See 444 U.S. 102, n.22.

B. THE ROLE OF THE DEFENSE COUNSEL IN A CRIMINAL PROSECUTION WARRANTS THE DEFENSE OF ONLY A QUALIFIED IMMUNITY IN ACTIONS UNDER §1983.

Prior to this Court's decision in *Ferri v. Ackerman,* 444 U.S. 193 (1979) respectable authority held that the role of the judge, prosecutor, and defense counsel in a criminal prosecution were identical.[22] *Ferri* squarely held that the

[22]See, e.g. *Minns v. Paul,* 542 F.2d 899 (4th Cir. 1976); *Robinson v. Bergstrom,* 579 F.2d 401, 409-411 (7th Cir. 1978); *Miller v. Barilla,* 549 F.2d 648 (9th Cir. 1977).

judge, prosecutor and defense counsel are not part of an inseparable triumvirate:

> In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serve pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation. The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently. *The primary rationale for granting immunity to judges, prosecutors and other public officers does not apply to defense counsel sued for malpractice by his own client.* (444 U.S. 204) (footnotes omitted) (emphasis added)

Ferri held that federal law did not mandate an absolute immunity for attorneys appointed under the Criminal Justice Act and sued in state Court.

Respondent submits that *Ferri v. Ackerman* is dispositive of the issue at bar. The Sixth Amendment guarantee of the right to counsel does not distinguish between a privately retained attorney or one supplied by the state. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois,* 351 U.S. 12, 19 (1956). There is little that is more critical in this respect than the right to the assistance of counsel. *Gideon v. Wainright,* 372 U.S. 335 (1963). Thus, the responsibilities of the attorney, whether privately retained, court appointed or a public defender must be the same. If federal law does not

mandate absolute immunity for an attorney appointed under the Criminal Justice Act, such a shield from accountability is not required for public defenders.

Furthermore, an analysis of this Court's decisions granting various immunities under §1983 indicates that only a qualified immunity is warranted. In *Pierson v. Ray,* 386 U.S. 547 (1967) absolute immunity was granted to judges based upon the doctrine "solidy established at common law that the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." 386 U.S. 554. In *Imbler v. Pachtman,* 424 U.S. 409 (1976) this absolute immunity was extended to prosecutors by analogizing the role of the prosecutor to that of a judge (424 U.S. 422-23). In *Imbler,* it was stated at 424 U.S. 425:

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.

The *Imbler* decision further noted that the prosecutor enjoyed a long standing immunity at common law, and found that such immunity was still justified on public policy considerations. 424 U.S. 424. In a footnote, the Court developed the analogy between the role of the judge and prosecutor by noting that both exercise a discretionary judgment on the basis of evidence presented to them. (424 U.S. 423 no.20). In both *Pierson v. Ray* and *Imbler v. Pachtman* then, it was not the mere exercise of discretionary judgment that warranted an absolute immunity, rather than the unique public responsibilities of the judge and prosecutor in the criminal justice system justified the shield from §1983 liability.

Petitioners argue in their brief than an absolute immunity is required so that public defenders might exercise "independent professional judgment." (Petitioner's brief pp. 53-64). Yet, many public officials who exercise independent judgment enjoy only a qualified immunity from liability. Police officers,[23] prison officials,[24] state hospital superintendents,[25] school board members,[26] and state executive officers[27] all enjoy a qualified or good faith immunity under §1983. The argument that absolute immunity was necessary to protect the discretionary acts of these officials was rejected in each of these cases. As stated in *Butz v. Economu,* 438 U.S. 478, 505 (1978); "If, as the government argues, all officials exercising discretion were exempt from personal liability, a suit under the Constitution could provide no redress to the injured citizen, nor would it in any degree deter federal officials from committing constitutional wrongs."[28] Petitioners in the instant action are making the same tired argument. They ask too much and the purported need for absolute immunity to protect discretionary acts should be rejected.[29]

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[23]*Pierson v. Ray,* 386 U.S. 547 (1967).

[24]*Procunier v. Navarette,* 434 U.S. 555 (1978).

[25]*O'Connor v. Donaldson,* 422 U.S. 563 (1975).

[26]*Wood v. Strickland,* 420 U.S. 308 (1975).

[27]*Scheur v. Rhodes,* 416 U.S. 232 (1974).

[28]*Butz v. Economu,* 438 U.S. 478 (1978) was not brought under 42 U.S.C. §1983 but was a direct action for violation of constitutional rights. The Court in *Butz* found §1983 cases persuasive by analogy. See 438 U.S. 496.

[29]A further flaw in Petitioner's argument should be noted. A shield of absolute immunity from federal liability would deprive Respondent of a federal remedy but would not encourage the free exercise of discretion since the public defender would assumedly be subject to civil liability in the state Courts. The imposition of malpractice liability for public defenders as an alternative to §1983 liability is suggested by Petitioners in their Brief (p. 100).

In summary, the decisions of the Court dictate the imposition of a qualified immunity for the public defender in the representation of his indigent client. The "principal responsibility" of the public defender is to "serve the undivided interest of his client." *Ferri v. Ackerman,* 444 U.S. 204 (1979). The defense counsel in thus distinguished from the judge and prosecutor who owe their primary responsibilities to the public. The decisions of this Court recognize that a qualified immunity is sufficient protection for discretionary acts by state officials and there are no compelling public policy reasons for granting an absolute immunity.

C. THERE ARE NO COMPELLING PUBLIC POLICY CONSIDERATIONS WARRANTING PUBLIC DEFENDERS AN ABSOLUTE IMMUNITY FROM SUIT.

Petitioners in their brief advance at least seven policy considerations for the absolute immunity of public defenders: (1) recruitment of able lawyers, (2) heavy caseloads of public defenders and time "wasted" in defense of §1983 suits, (3) §1983 liability would dissuade public defenders from "confessing error", (4) collateral review of criminal convictions under §1983, (5) flooding federal courts with §1983 actions, (6) alternative sanctions are available for misconduct by public defenders, and (7) available alternatives to the client such as post-conviction relief or habeas. Each of these arguments will be addressed by Respondent. Respondent submits that the policy considerations have either been rejected by this Court in other contexts or are simply not sufficient reason to warrant an absolute immunity under Section 1983.

Petitioners argue that absolute immunity is required so that able lawyers are willing to serve as public defenders. (Petitioner's Brief

pp. 80-84). They further state that "this problem of recruitment will be nearly impossible to solve without absolute immunity . . ." (Petitioner's Brief p. 82). These arguments were rejected in *Ferri v. Ackerman,* where the Court noted the lack of empirical data to support the conclusion that the "risk of malpractice litigation deters members of the private bar from accepting the representation of indigent defendants or adversely affects the quality of representation." *Ferri v. Ackerman,* 444 U.S. 200 n.17. Moreover, the empirical evidence available suggests there is presently a glut of lawyers, presumably competent, and available to serve as public defenders. See *Argersinger v. Hamlin,* 407 U.S. 25, 37 n.7 (1972); "Indeed, there are 18,000 new admissions to the bar each year — 3,500 more than are required to fill the estimated 14,500 average annual openings." The most recent figures indicate that there are 34,000 law school graduates in the class of 1981 and 26,400 legal jobs available.[30] As in *Argersinger* and *Ferri,* the argument that a lack of available lawyers militate against the protection of a criminal defendant's constitutional rights is factually incorrect.

The Petitioners argue that the defense of Section 1983 actions will divert attention from the chief responsibility of public defenders — defending criminal defendants (Petitioner's Brief, pp. 84-90). This concern has been rejected in a variety of suits against public officials including police officers, prison officials, state hospital superintendents, school board members, and the state executive officers.[31] This argument of time diverted to the defense of litigation was most emphatically rejected in *Butz v. Economu,* 438 U.S. 478, 506-507 (1978):

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[30]See, "Scrambling for Jobs in the J.D. Rat Race" The National Law Journal, Vol. III, No. 33, Page 1, April 27, 1981.

[31]See Notes 23 through 27, *supra.*

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive. Moreover, the Court recognized in Scheuer that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 U.S. at 250, 40 L.Ed. 2d 90, 94 S. Ct. 1683, 71 Ohio Ops 2d 474. In responding to such a motion, plaintiffs may not play dog in the manger, and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

This statement is equally applicable to the instant case, and disposes of Petitioner's argument.

Petitioner's third argument is that Section 1983 liability would dissuade public defenders from "revealing weakness in the case or confessing error for a new trial". (Petitioner's brief p. 90-92).

Petitioners do not cite a single authority for this novel argument, nor do they cite a single case where a public defender or a criminal attorney has confessed error. Moreover, the perceived goal of encouraging public defenders to confess error would be adequately protected by a *qualified* immunity from liability. An absolute immunity should not be granted in the "absence of the most convincing showing that the immunity is necessary." *Imbler v. Pachtman,* 424 U.S. 409, 434 (1976) (White, concurring).

Petitioners assert that Section 1983 liability would encourage "collateral attacks on judicial proceedings." (Petitioner's brief pp. 93-95). This consideration is hardly a justification for absolute immunity from suit. A Section 1983 action would not be an attack on the underlying criminal conviction and an award of damages would not set aside the conviction. The proper response to a frivolous 1983 action is a motion to dismiss or a motion for summary

judgment as recognized in *Butz v. Economu, supra.* The possibility that a successful 1983 action for ineffective assistance of counsel may make it easier to set aside a state court conviction by post-conviction proceedings would mean only that the state court conviction should be set aside. As before, the remedy for this concern is the dismissal or summary judgment of non-meritorious suits.

Closely related to their other arguments is Petitioner's assertion that absolute immunity is necessary to prevent a flood of §1983 suits (Petitioner's brief, pp. 95-97). This argument has not found legitimacy in the opinions of this Court where immunity under Section 1983 has been requested and is an insufficient justification for absolute immunity in this case. The procedures available to a litigant through the Federal Rules of Civil Procedure will insure that the judicial investment of time is minimal. An absolute bar to valid lawsuits is not required for this legitimate concern.

The Petitioners argue that alternative sanctions such as disciplinary actions, judicial sanctions and criminal prosecutiions against a public defender merit an absolute immunity under §1983 (Petitioner's Brief pp. 97-101). To the indigent defendant, these remedies are more apparent than real. There is simply no body of developed case law or other authority to suggest that these sanctions against a public defender are sufficient to deter the ineffective assistance of counsel.[32] Moreover, a judicial or even criminal penalty against the public defender does not help the client. The basic purpose of Section 1983 liability is to "compensate

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[32]See Bines, "Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus," 59 Virginia Law Review 927, 972-75 (1973).

persons for injuries caused by the deprivation of constitutional rights." *Carey v. Piphus,* 435 U.S. 247, 252 (1978). Petitioner's suggestion that alternative sanctions make §1983 liability unnecessary ignores this fundamental goal of compensation for the aggrieved party. This "policy consideration" by Petitioners is without merit.

Finally, Petitioners argue that §1983 liability is not necessary because alternatives such as habeas corpus or post-conviction relief ensures effective representation by public defenders (Petitioner's Brief, pp. 104-109). This argument overlooks that the essential purpose of Section 1983 is to provide compensation to an aggrieved person. *Carey v. Piphus,* 435 U.S. 247 (1978). It also incorrectly assumes that habeas and post-conviction provide an effective deterrent to ineffective representations of counsel. In both habeas and post-conviction, the result is a new trial — the attorney responsible for the ineffective representation receives no sanction at all. These remedies are purely retrospective and have virtually no deterrent effect on ineffective attorneys. Perhaps most importantly, these remedies have no deterrent effect at all when ineffectiveness results in harmless error thus denying habeas to a defendant. See *Chapman v. California,* 386 U.S. 18 (1967). The way to deter a lawyer (like most public officials) is by damages. Habeas and post-conviction relief are simply not effective.[33]

In summary, each consideration urged by Petitioners for the imposition of absolute immunity is without merit, or can

[33]See Bines, "Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus" 59 Virginia Law Review 927, 970-983 (1973) where the author cogently argues that habeas is ineffective and Section 1983 liability is necessary to ensure the effective assistance of counsel.

be remedied by motion practice authorized by the Federal Rules of Civil Procedure. Furthermore, the valid concerns of Petitioners are protected by a qualified immunity. A qualified immunity for public defenders is an appropriate compromise between the liability of a public defender under §1983 and the public interest in providing relief to indigent clients whose constitutional rights are violated.

D. THE PUBLIC INTEREST, AND THE INTERESTS OF THE PUBLIC DEFENDER AND HIS CLIENT ARE BEST SERVED BY GRANTING THE PUBLIC DEFENDER A QUALIFIED IMMUNITY UNDER 42 U.S.C. §1983.

The Court below determined that the public defender was as a matter of public policy, entitled to a qualified immunity from suit (628 F.2d 1108):

> Public defenders need the assurance that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity. *Wood v. Strickland,* 420 U.S. 308, 321, 95 S.Ct. 992, 1000 43 L.Ed. 2d 214 (1975). The defender oversteps the immunity boundary, however, if he acts in a manner which he knows or reasonably should know will violate the constitutional rights of his client, or if he acts with the malicious intentions to injure his client. The touchstone is good faith. Id. at 322, 95 S.Ct. at 1000.

The definition of the qualified immunity below is clear and concise. It is easily understood by lawyers serving as public defenders. It is not different in substance from the requirement in *Wood v. Strickland,* 420 U.S. 308 (1975) that the school official knows the "unquestioned, con-

stitutional rights of his charges." Id. 322. It specifically adopts the "knew or reasonably should have known" language of *Wood v. Strickland* at 420 U.S. 322. Most importantly, it is a very fair standard to be applied to lawyers, who unlike school board members *do* possess a "unique competency in defining the law."[34] The qualified immunity from the decision below adequately protects the ability of public defenders to "exercise discretion in a forth right manner"[35] in the vigorous representation of their clients. It is a fair and reasonable compromise between the interests of society and the public defender and his client.

Two basic purposes of §1983 are to "provide a federal remedy where the state remedy, though adequate in theory, was not available in practice" *Monroe v. Pape,* 365 U.S. 167, 174 (1961) and "to compensate persons for injuries caused by the deprivation of constitutional rights" *Carey v. Piphus,* 435 U.S. 247, 252 (1978). While it may be argued the Respondent has a remedy in the state courts of Iowa, that remedy is surely not available to him "in practice." Chapter 613A, Code of Iowa (1981) imposes liability for torts committed by "officers, employees, and agents acting within the scope of their duties."[36] Arguably, this waiver of sovereign immunity would include the breach of constitutional duties alleged in Respondent's complaint.

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[34]Applying this standard to lawyers should satisfy the concern of four members of this Court who in *Wood v. Strickland,* sought a lesser standard for qualified immunity based upon the "good faith" requirement of *Scheur v. Rhodes,* 416 U.S. 232, 247-248 (1974) at 420 U.S. 328-331 (Powell dissenting).

[35]*Wood v. Strickland,* 420 U.S. 320 (1975).

[36]Section 613A.7, Code of Iowa (1981).

Respondent asks this Court to judicially notice the practical barriers to his successful suit under this statute: He is indigent and incarcerated. He is certainly unable to hire a lawyer on an hourly basis and a contingent fee arrangement is not attractive to private attorneys.[37] A lawyer will not be appointed for him as in the instant case under Section 1983. He is uneducated in the law and may not even be permitted to attend crucial discovery proceedings or a civil trial. Perhaps most importantly, he must commence suit within six months or give a detailed notice to the County within sixty days.[38] It is very unlikely, as a practical matter, that indigent criminal defendants (usually incarcerated) would be able to overcomee these obstacles.[39] Furthermore, suit must be filed in the same county where the defendant resides[40] — in this context the same county that funds the public defender. A substantial damages award is unlikely especially when the plaintiff must proceed without counsel. For all of these reasons, Respondent submits that his state remedy, if one exists, is simply not a "practical alternative" available to him.[41]

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[37]Attorney fees can be awarded for a successful 1983 action under 42 U.S.C. §1988, and a qualifying plaintiff may proceed *in forma pauperis.* There are no such provisions in Chapter 613A.5, Code of Iowa (1981).

[38]Section 613A.5, Code of Iowa (1981).

[39]Respondent has not complied with the notice requirements of Section 613A.5.

[40]Section 616.3(2), Code of Iowa (1981).

[41]While not relied upon by Petitioners in their brief, Respondent is aware of this Court's recent decision in *Parratt v. Taylor,* 40 U.S.L.W. 4509 (May 19, 1981). This case involved an action under § 1983 for the negligent loss of a hobby kit valued at $23.50. The Court held that Respondent had not alleged a sufficient due process deprivation of his property in that the Nebraska Tort Claims procedure was adequate.

(continued)

Section 1983 was enacted to aid in "the preservation of human liberty and human rights." *Owen v. City of Independence,* 445 U.S. 622 (1980). The statute, as remedial legislation, is to be construed generously to further its primary purpose. Id., at 636. That purpose, as often recognized by this Court, is to provide a federal damages remedy for the deprivation of constitutional rights. *Carey v. Piphus,* 435 U.S. 247 (1978); *Gomez v. Toledo,* 444 U.S. 1031 (1980). Respondent has specifically alleged a deprivation of a fundamental constitutional right — the right to counsel guaranteed by the Sixth and Fourteenth Amendments. He has thus met the first inquiry in a § 1983 case, see *Martinez v. California,* 445 U.S. 920 (1980); *Baker v. McCollan,* 443 U.S. 507 (1980). His allegations, if proven, would entitle him to damages.

Petitioners would deny Respondent his day in court by a grant of absolute immunity. As seen, this shield from accountability cannot be justified on public policy considerations. The goal of encouraging the effective representation of indigent defendants will be promoted by making public defenders liable for damages, and the grant of a qualified immunity will protect the legitimate concerns advanced by Petitioners. A qualified immunity will give Russell Dodson his day or hour in court. The Petitioners have the burden of pleading their defense of qualified

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(footnote continued from preceding page)

Respondent in the instant case does not allege a property deprivation but a denial of his constitutional right to effective representation of counsel. It would simply make no sense to find that a public defender's denial of this constitutional right is not a deprivation of a "right . . . secured by the Constitution . . ." under 42 U.S.C. § 1983. *Parratt v. Taylor,* should therefore be limited to a deprivation of property without due process of law. See White (concurring) at 49 U.S.L.W. 4513: "I do not read the Court's opinion as applicable to a case concerning deprivation of life or of liberty."

immunity, *Gomez v. Toledo,* 444 U.S. 1031 (1980), and they can move for summary judgment, if appropriate. The case may be dismissed, and Petitioners' investment of time will be negligible. If, however, the case has merit, then the imposition of a qualified immunity will enable Respondent to recover the damages he is entitled to under §1983. Whether Respondent is entitled to an hour in court on a Motion for Summary Judgment or a day in recovering damages is not the issue before this Court—§1983 will again aid in the "preservation of human liberty and human rights." *Owen v. City of Independence,* 445 U.S. 622 (1980).

In summary, Respondent's complaint should be heard and determined by a jury in federal court. No compelling reason has been established that entitles the public defender to an absolute immunity, and the qualified immunity defined in the court below is the proper balance between the competing interests of the public defender's unfettered representation of his client and the client's need for redress of his grievance. "Any lesser standard would deny much of the promise of §1983." *Wood v. Strickland,* 420 U.S. 308, 322 (1975).

CONCLUSION

For all of the reasons advanced in this Brief and Argument, Respondent respectfully prays that the decision of the Circuit Court be affirmed in all respects.

/s/ John D. Hudson

Court-appointed Counsel
For Respondent